No. 89-1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Petitioner,

v.

UNITED STATES POSTAL SERVICE,

and

NATIONAL POST OFFICE MAIL HANDLERS, WATCHMEN AND GROUP LEADERS DIVISION OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, gives the federal courts the power to create a generalized federal common law of labor relations which may be employed to override the agreement of the parties as interpreted by an arbitrator and to compel those parties to accept an arbitration procedure to which they have not agreed, but which comports with the court's notions of economy and efficiency.

2. Whether, in particular, Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, gives the federal courts the power to compel tripartite arbitration of a jurisdictional dispute between an employer and two unions, where an arbitrator has already interpreted the relevant collective bargaining agreement as permitting only bilateral arbitration and, for that reason, has refused to permit intervention by a union which is not a party to the agreement.*

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* The appellant in the court of appeals, now petitioner in this Court, was the American Postal Workers Union, AFL-CIO. The appellees in the court below, now respondents in this Court, were the United States Postal Service and National Post Office Mail Handlers, Watchmen and Group Leaders Division of the Laborers' International Union of North America, AFL-CIO.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The American Postal Workers Union petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the decision and judgment in *United States Postal Service v. American Postal Workers Union*, 893 F.2d 1117 (9th Cir. 1990).

OPINIONS BELOW

The opinion of the court of appeals is reported at 893 F.2d 1117 and is reprinted in the appendix to this pe-

tition at 1a-11a.[1] The order of the court of appeals denying rehearing is unreported and is reprinted at Pet. App. 12a. The opinion on cross-motions for summary judgment of the District Court for the Northern District of California is unreported and is reprinted at Pet. App. 13a-17a.

JURISDICTION

The court of appeals' judgment was entered on January 12, 1990, and its order denying rehearing was entered on March 15, 1990. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 39 U.S.C. §§ 409 and 1208, and 28 U.S.C. §§ 1331 and 1337. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are reprinted at Pet. App. 18a-27a.

STATEMENT OF THE CASE

1. *Facts.* Petitioner in this case, the American Postal Workers Union, AFL-CIO ("Petitioner" or "APWU"), is a labor organization representing employees or respondent United States Postal Service ("Postal Service") for purposes of collective bargaining. Other employees of the Postal Service in separate bargaining units are represented for purposes of collective bargaining by other labor organizations, including respondent National Post Office Mail Handlers, Watchmen and Group Leaders Division of the Laborers' International Union of North America, AFL-CIO ("Mail Handlers"). Pet. App. 2a; E.R. 22.

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[1] Citations to the Petitioner's Appendix shall be denominated as "Pet. App. —." Citations to documents contained in the Excerpt of Record filed in the court of appeal shall be denominated "E.R. —." Citations to documents contained in the Clerk's Record in the district court shall be denominated at "C.R. —."

Prior to 1981, the APWU and the Mail Handlers engaged in joint collective bargaining negotiations with the Postal Service and were signatory to a single collective bargaining agreement. Pet. App. 2a; E.R. 22. That single agreement included a provision granting to each union the right to intervene in arbitration proceedings initiated by the other union:

> In any arbitration proceeding in which a union feels that its interest may be affected, it shall be entitled to intervene and participate in such arbitration proceeding, but it shall be required to share the cost of such arbitration equally with any or all other union parties to such proceeding.

E.R. 36. 41.

In 1981, the Mail Handlers chose to withdraw from joint bargaining with the APWU, and instead to bargain separately with the Postal Service. Pet. App. 2a; E.R. 22, 24-25. The Postal Service thereafter entered into separate collective bargaining agreements with the APWU and the Mail Handlers for the periods 1981-1984, 1984-1987 and 1987-1990. E.R. 24-26. Although these separate collective bargaining agreements are similar in many respects, and although each contains an arbitration provision covering *inter alia* jurisdictional disputes, neither the APWU agreement nor the Mail Handlers agreement contains a provision permitting the other union to participate in its arbitration procedure. Pet. App. 3a; E.R. 24.[2]

In June 1985, the APWU filed a grievance under the dispute resolution procedures of its collective bargaining agreement, alleging that certain work performed by

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[2] Although the Postal Service could have sought a provision establishing tripartite arbitration of jurisdictional disputes in the 1981, 1984 and 1987 collective bargaining negotiations, it chose not to make such a collective bargaining proposal to the APWU. E.R. 29-30.

postal employees at the San Francisco Airport Mail Facility had been improperly assigned by the Postal Service to employees represented by the Mail Handlers, rather than to employees represented by the APWU, in violation of the APWU agreement and Regional Instruction 399.[3] The APWU's grievance was not resolved by the grievance procedure and was appealed to bipartite arbitration between the APWU and the Postal Service under their collective bargaining agreement. Pet. App. 3a.

Prior to the arbitration hearing, the Mail Handlers petitioned to intervene in the arbitration between the APWU and the Postal Service. Pet. App. 3a. E.R. 2. The Postal Service supported the Mail Handler's motion to intervene, and the APWU opposed that motion. E.R. 2. The parties agreed, however, to brief the issue and submit it to the arbitrator, for a decision prior to arbitration proceedings on the merits. E.R. 2.

On August 28, 1987, the arbitrator denied the Mail Handlers' motion to intervene, holding that "there is no agreed-upon mechanism for resolving this dispute by allowing the Mail Handlers to intervene" (E.R. 3) and that "the contract under which this dispute is being arbitrated simply does not authorize" tripartite arbitration (E.R. 10). *See also* Pet. App. 3a. The arbitrator also rejected the Postal Service's and the Mail Handlers' argument that past practice under the contract (in which the APWU had occasionally voluntarily agreed to tripartite arbitration on a case-by-case basis) "established a past practice which is binding on the parties." E.R. 10. The arbitrator therefore concluded that "this matter will proceed as a bilateral arbitration between the Postal Service and the APWU." E.R. 10.

2. *Proceedings Below.* On April 12, 1988, the Postal Service filed suit in federal district court against the

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[3] Regional Instruction 399 is a set of work assignment guidelines to which the Postal Service, the APWU and the Mail Handlers are bound. E.R. 14.

APWU and the Mail Handlers, seeking a declaratory judgment and an order compelling tripartite arbitration of the dispute. Pet. App. 3a. The APWU Answer asserted a counterclaim against the Postal Service seeking to compel bipartite arbitration and an affirmative defense that the Postal Service's Complaint was barred by California's 100-day statute of limitations applicable to suits to set aside arbitrator's awards. Pet. App. 10a; C.R. 7. The Mail Handlers asserted crossclaims and counterclaims in its Answer seeking tripartite arbitration and a permanent injunction covering any future jurisdictional disputes. Pet. App. 3a.

All three parties filed cross-motions for summary judgment. Prior to the filing of the APWU's reply brief on its own motion and its opposition to the Mail Handlers' motion were not due until August 18, 1988, the district court issued its order and judgment on the cross-motions for summary judgment on August 5, 1988, granting the Postal Service's motion for an order compelling tripartite arbitration. Pet. App. 3a; R. 148-155.[4]

On appeal, the Ninth Circuit affirmed the judgment of the district court. Pet. App. 11a. Although the court of appeals recognized that "a court can only compel arbitration pursuant to the parties' contract" (Pet. App. 5a), the court held that there was a sufficient "contractual nexus" between the parties to support the district court's power to order tripartite arbitration (Pet. App. 6a) despite the uncontested fact that the APWU agreement does *not* permit tripartite arbitration. Pet. App. 2a-3a.

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[4] The district court's August 5, 1988 Order also denied the Mail Handlers' motion for a permanent injunction. Pet. App. 18a; E.R. 152-153, 155. On August 30, 1988, the district court amended its August 5 Order to reflect that it had also denied the APWU's motion for summary judgment. Pet. App. 19a; E.R. 156-157.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' TRIPARTITE ARBITRATION DECISION IS BASED ON A FUNDAMENTAL MISUNDERSTANDING OF THIS COURT'S CASES PERMITTING FEDERAL COURTS TO CREATE A FEDERAL COMMON LAW UNDER § 301, AND AS SUCH RAISES A CRITICAL ISSUE OF NATIONAL LABOR POLICY.

The Ninth Circuit decided in this case that a federal court has the power, under court-created federal common law, to *absolve* an employer of the obligation to arbitrate under contractually-established bipartite procedures, and instead to require a union, in this case the APWU, to: (a) participate in a tripartite arbitration proceeding, a format to which it has not agreed; (b) arbitrate with a party—another union—with which it has no contract and no dispute resolution mechanism; (c) arbitrate concerning, in part, a collective bargaining agreement—that between the employer and the other union—to which the APWU is not bound; and (d) do so in an arbitration proceeding in which the arbitrator has already ruled that the APWU's agreement does not provide for such a tripartite arbitration procedure.

In justifying its result, the Ninth Circuit invoked the authority of federal courts to fashion federal common law under § 301 of the Labor-Management Relations Act. Pet. App. 5a. But that authority has always been understood by this Court and, with the sole exception of other cases ordering tripartite arbitration (*see* pp. 20-21, *infra*), by the lower federal courts as conferring authority on the federal courts to interpret and apply, not supervene, the parties' labor agreements. The courts' unfortunate decision to *override* the parties' agreement in the name of a free-floating federal common law of labor relations, like several other lower courts decisions in the same vein, departs diametrically from federal labor policy as interpreted by numerous decisions of this

Court, and runs counter to other lines of lower court decisions in suits to compel arbitration or review arbitrators' awards.

As this Court has repeatedly stressed, federal labor policy strives to encourage free collective bargaining and, to that end, *prohibits* federal courts and agencies from dictating the terms of agreement between private parties or modifying the terms of agreement reached through collective bargaining. *See, e.g., United Steelworkers v. Rawson*, —— U.S. ——, 58 U.S.L.W. 4556, 4559 (1990); *United Mine Workers Health & Retirement Funds v. Robinson*, 455 U.S. 562, 576 (1982); *Carbon Fuel Co. v. United Mine Workers*, 444 U.S. 212 (1979); *NLRB v. Burns International Security Services*, 496 U.S. 272, 283, 287 (1972); *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). While federal labor policy favors the *voluntary* settlement of industrial disputes through arbitration, that policy is violated, not served, by *compulsion* upon private parties to submit their disputes to an arbitration forum other than the one established by a collective bargaining agreement to which they are bound. *See, e.g., AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643 (1986); *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 374 (1974); *N.L.R.B. v. Plasterers' Local Union No. 79*, 404 U.S. 116 (1971); *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261 (1964); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960); *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960). Thus, the opinion below is not merely incorrect but threatens to undermine the central pillar of federal labor policy—the principle that industrial peace can be achieved only through the encouragement of voluntary, enforceable agreements reached through free collective bargaining.

1. *Federal Common Law and Federal Labor Policy.* (a) In a series of decisions beginning with *Textile*

Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), this Court has articulated the functions and delineated the authority of the federal courts in adjudicating cases arising under § 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185, and other similar statutes which give the federal courts jurisdiction over actions for violation of collective bargaining agreements.[5] In *Lincoln Mills*, the Court held that § 301 was not merely jurisdictional, but rather was a source of judicial authority to declare substantive federal common law. *Id.* at 451-57.

As early as *Lincoln Mills*, however, this Court made clear that the federal common law available under § 301 is not a generalized federal common law of labor relations, but rather a federal common law of labor *contracts;* the purpose of this common law is to permit labor agreements to be *enforced*, especially their arbitration provisions:

> § 301(a) . . . authorizes federal courts to fashion a body of federal law for the *enforcement* of these col-

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[5] The Postal Reorganization Act of 1971, 39 U.S.C. §§ 101 *et seq.*, gives postal employees the right to engage in collective bargaining regarding wages, hours and conditions of employment, and establishes the jurisdiction of the National Labor Relations Board ("NLRB") over the Postal Service. *See* 39 U.S.C. §§ 1201 *et seq.* Although postal employees are prohibited from striking, collective bargaining relationships between the Postal Service and its employees are, in all respects relevant to this case, the same as in the private sector. *See id.* Like LMRA § 301, 39 U.S.C. § 1208(b) grants federal district courts jurisdiction over suits for violation of agreements between the Postal Service and the unions representing its employees, and 39 U.S.C. § 1209 provides that consistent provisions of the LMRA, 29 U.S.C. §§ 151-169, apply to Postal Service labor relations. For that reason, the federal courts have applied decisions under LMRA § 301 to the Postal Service context. *See, e.g., American Postal Workers Union v. United States Postal Service*, 823 F.2d 466, 469 (11th Cir. 1987); *Nat'l Ass'n of Letter Carriers v. United States Postal Service*, 590 F.2d 1171, 1174-75 (D.C. Cir. 1978).

> lective bargaining agreements and includes within that federal law *specific performance of promises to arbitrate grievances* under collective bargaining agreements. . . . That is our construction of § 301 (a), which means that the agreement to arbitrate grievance disputes, contained in this collective bargaining agreement, should be *specifically enforced.*

Lincoln Mills, supra, 353 U.S. at 450-51 (emphasis added). Although the federal common law announced in *Lincoln Mills* was, like any common law to be judicially developed on a case-by-case basis, the federal courts are not free to develop this law according to their own policy preferences, but must strive to effectuate the federal labor policy as expressed by Congress:

> The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Some will lack express statutory sanction but will be solved by *looking at the policy of the legislation and fashioning a remedy that will effectuate that policy.*

Id., 353 U.S. at 456-57 (emphasis added).

(b) In decisions subsequent to *Lincoln Mills,* this Court has developed these principles into a well-articulated doctrine. To effectuate federal labor policy, the federal courts are empowered to enforce the terms of those collective bargaining agreements; but they have no power to modify the terms of freely negotiated collective bargaining agreements. In particular, the courts cannot compel submission of a dispute to an arbitration forum to which the parties are not contractually bound.

In *H.K. Porter Co., supra,* 397 U.S. 99, for example, the Court held that National Labor Relations Act (NLRA) § 8(d), 29 U.S.C. § 158(d), prohibits the NLRB from compelling an employer to agree to be bound by a specific provision of a collective bargaining agreement, even if the NLRB finds that the employer's

refusal to so agree is in bad faith.[6] The Court stressed the fundamental importance of the freedom of collective bargaining and the consequent necessity of official non-interference:

> The Board's remedial powers under § 10 of the Act are broad, but they are limited to carrying out the policies of the Act itself. One of these fundamental policies is freedom of contract. While the parties' freedom of contract is not absolute under the Act, allowing the Board to compel agreement when the parties themselves are unable to agree would violate the fundamental premise on which the Act is based—private bargaining under governmental supervision of the procedure alone, without any official compulsion over the actual terms of the contract.

H.K. Porter Co., supra, 397 U.S. at 108 (footnotes omitted). *See also NLRB v. Burns International Security Services, supra,* 406 U.S. at 284, 287.

Subsequently, in *Carbon Fuel Co., supra,* 444 U.S. 212, the Court made clear that this "hands off" policy applies equally to the federal courts under § 301. The Court cited NLRA § 8(d) and the decisions interpreting it, and concluded that "i[t] follows that the parties' agreement primarily determines their relationship." *Id.*, 444 U.S. at 219. Relying on its decision in *Warrior & Gulf Navigation Co., supra,* 363 U.S. at 582, that the courts cannot compel arbitration without an agreement to arbitrate, the Court concluded, "If the parties' agreement specifically resolves a particular issue, the courts cannot substitute a different resolution." *Id. See also Rawson, supra,* 58 U.S.L.W. at 4559 (" 'when neither the collective-bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the

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[6] NLRA § 8(d) provides that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." 29 U.S.C. § 158(d).

substantive terms of a collective-bargaining contract' ") (quoting *Robinson, supra*, 455 U.S. at 576).[7]

A corollary principle—that the courts may not compel submission of a dispute to an arbitration forum or procedure to which the parties are not even arguably contractually bound—has also been clearly enunciated and adhered to by this Court. Thus, although federal labor policy favors the private resolution of industrial disputes, that policy has a crucial caveat: such private resolution method must be strictly voluntary, in compliance with the strong federal labor policy of encouraging *free* collective bargaining. This balanced corollary, established by Congress in the LMRA, has been explained and applied in an unbroken line of this Court's decisions.

Thus, in *American Manufacturing Co., supra*, 363 U.S. 564, the Court looked to the federal labor policy expressed in LMRA § 203(d), 29 U.S.C. § 173(d), which provides that " '[f]inal adjustment *by a method agreed upon by the parties* is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement.' " *American Manufacturing Co., supra*, 363 U.S. at 566 (quoting 29 U.S.C. § 173(d)) (emphasis added). From this congressional declaration,

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[7] This Court's decisions implying a no-strike clause into labor agreements containing arbitration clauses are not to the contrary. *See, e.g., Teamsters Local 174 v. 1 Lucas Flour Co.*, 369 U.S. 95 (1962). In such cases, a no-strike clause is *implied in fact* from the existence of an arbitration clause covering the dispute in question. That is, the Court applies a principle of contract interpretation that presumes that inclusion of an arbitration clause is an expression of the parties' *intent* that the union be prohibited from striking over, rather than arbitrating, any arbitrable dispute, but allows the presumption to be rebutted by evidence of a contrary intent. *Gateway Coal Co., supra*, 414 U.S. at 282. Thus, the question in such cases is ultimately one of contract construction, not of imposing upon one or more of the parties a court-dictated solution to a labor relations issue.

the Court concluded that federal labor policy "can be effectuated *only if the means chosen by the parties* for settlement of their differences under a collective bargaining agreement is given full play." *Id. See also Warrior & Gulf Navigation Co., supra*, 363 U.S. at 582; *Gateway Coal Co., supra*, 414 U.S. at 374; *AT&T Technologies, Inc., supra*, 475 U.S. at 648-49.[8]

(c) This Court's cases also establish conclusively that the limited nature of the federal common law of labor relations, and the concomitant *voluntary* character of labor arbitration, are not confined to bilateral disputes, but extend with equal force to disputes between an employer and two or more unions. In *Carey, supra*, 375 U.S. 261, the Court held that the courts should grant requests for bilateral contractual arbitration of jurisdictional disputes, even though such a proceeding might not result in a final resolution of the entire controversy. At no point in that decision did the Court ever suggest that the federal courts have power under § 301 to compel *noncontractual* trilateral arbitration of such disputes. Nor was this possibility suggested by the dissenting opinion, which specifically relied upon the asserted inability of bilateral arbitration to resolve jurisdictional disputes. *See id.*, 375 U.S. at 273-76 (Black, J., joined by Clark, J., dissenting).

Subsequently, in *Plasterers' Local Union No. 79, supra*, 404 U.S. 116, the Court approved the NLRB's policy of

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[8] The Court applies a rule of *interpretation* of contracts that favors arbitrarily, and therefore presumes that disputes are arbitrable, absent some clear indication to the contrary. *Warrior & Gulf, supra*, 363 U.S. at 582-83. This presumption, however, once again (*see* n. 7, *supra*), is simply an aid in discovering the parties' intent, and not an imposition of a duty to arbitrate without regard to that intent. *Warrior & Gulf, supra*, 363 U.S. at 582 ("a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit"); *A T & T Technologies, supra*, 475 U.S. at 648-50; *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 372 (1984) (presumption of arbitrability "best accords with the parties' presumed objectives in pursuant collective bargaining").

refusing to defer to mechanisms for the private settlement of jurisdictional disputes unless *all* parties before the NLRB have agreed to be bound by the results of such mechanisms. The Court stated,

> Although this Court has frequently approved an expansive role for private arbitration in the settlement of labor disputes, this enforcement of arbitration agreements and settlements has been predicated on the view that the parties have *voluntarily bound themselves* to such a mechanism at the bargaining table. . . . [W]e decline to narrow the Board's powers . . . so that [parties] are coerced to accept compulsory private arbitration when Congress has declined to adopt such a policy.

Id., 404 U.S. at 133-34 (emphasis added).[9]

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[9] That federal labor policy is indeed hostile to the resolution of jurisdictional disputes through compulsory tripartite arbitration is apparent from the legislative history of the LMRA alluded to in *Plasterers' Local Union No. 79, supra*, 404 U.S. at 133-134. That history shows that although the original Senate bill permitted the NLRB to refer jurisdictional disputes to compulsory tripartite arbitration (*see* H.R. 3020 § 10(k), *reprinted in* 1 NLRB *Legislative History of the Labor Management Relations Act, 1947*, at 258-59 (1985)), this provision of the bill was deleted by the Conference Committee (*see* H. Conf. Rep. No. 510, 89th Cong., 1st Sess. at 15, *reprinted in* 1 NLRB *Legislative History, supra*, at 519). Instead, the NLRB was directed to resolve such disputes itself (*see id.*), and the circumstances under which the NLRB would be permitted to intervene into jurisdictional disputes was also strictly limited to instances in which illegal action to compel a work assignment had occurred (*see* 29 U.S.C. § 160(k)).

Thus, Congress provided an *administrative* mechanism for governmental intervention into jurisdictional disputes, and intended that mechanism to be available only under certain carefully delineated circumstances not present in the instant case. By so doing, Congress "expressed a clear preference for Board decision as compared with compelled arbitration, and . . . this policy preference must be respected." *See also NLRB v. Radio and Television Broadcast Engineers Union, Local 1212*, 364 U.S. 573, 581-82 (1961) (by deleting the provision for a Board-appointed arbitrator, Congress

In short, an unbroken line of this Court's precedents establishes that federal courts may *enforce* arbitration provisions in collective bargaining agreements, and in the course of doing so may develop federal common law principles concerning the interpretation and vindication of collective bargaining agreements; but the courts may not *alter* the parties' agreement in the name of federal common law by compelling the parties to submit to a dispute resolution mechanism other than one established in the agreement. Where, as here, an arbitrator has already ruled on the meaning of the agreement, the arbitrator's ruling may be set aside only if it does not draw its essence from the agreement. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597-99 (1960).

2. *The Ninth Circuit's Decision.* The Ninth Circuit sought to avoid this conclusion by construing this Court's § 301 federal common law cases much more broadly, as permitting courts to *revise* the dispute resolution mechanism established by the governing collective bargaining agreement as long as there is a "contractual nexus . . . as to both (a) the parties and (b) the subject matter." Pet. App. 5a. In support of its authority to compel departure from the contractually-created dispute resolution scheme in this manner, the Court of Appeals maintained that its departure from the contractual scheme was a minor one; relied on this Court's decision in *John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964) for the proposition that this Court "has been somewhat lenient in deciding which parties will be required to arbitrate. . . . [and] has not required strict contractual privity," (Pet. App. 6a); and rested upon its authority to devise federal common law, citing *Lincoln Mills, supra.*

In fact, the underlying premise of the Court of Appeals opinion would permit federal courts wide authority to interfere with the dispute resolution mechanism established by parties to labor agreements. As *Wiley* in-

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placed "the responsibility for compulsory determination of the dispute *entirely* on the Board") (emphasis added).

dicates, there is no cognizable difference between court determination of procedural issues addressed by the contract, and court determination of substantive issues under the agreement, in terms of national labor policy. And neither *Wiley* nor any other case of this Court sanctions, as part of the federal courts' responsibility to devise federal common law under § 301, court imposition of an arbitral procedure (or any other contractual provision) that is directly and demonstrably *contrary* to the intentions of the contracting parties, whether that procedural alteration involves the parties to the arbitration or some other court-imposed innovation.

(a) Although the Court of Appeals opinion does not so acknowledge, there is no difference in principle between a court-ordered tripartite arbitration contrary to the dispute resolution scheme established by the contract and any other procedural change a court might regard as more likely to lead to an equitable result. Like other procedural isuses, the number of parties participating in an arbitration can determine the complexity and length of the proceedings, and may also have some impact upon the outcome, as the vigor with which this case has been contested by all parties suggests. This is why issues concerning which parties will participate in a particular proceeding are treated at length as procedural issues under the Federal Rules of Civil Procedure (*see* Fed. Rule Civ. Pro. Rules 14, 17-25), coequal with issues concerning timeliness, pleadings, discovery, joinder of causes of action, the identity of the finder of fact, summary adjudication, and remedies.

In devising arbitration procedures, the parties to a collective bargaining agreement necessarily address themselves to all manner of procedural questions similar to those covered by the Federal Rules of Civil Procedure, including the identity of the arbitrator, the availability of summary procedures or mediation, the nature and timing of briefing, and so on. *See generally*, S. Elkouri and

E. Elkouri, *How Arbitration Works*, 222-95 (4th ed. 1985). Thus, if the federal courts are free to compel parties to accept tripartite arbitration, a procedural innovation to which they have not agreed, merely on the ground that there is a "contractual nexus" because the parties have agreed to *some* arbitration procedure as to a particular matter, then the courts will also be free to compel adherence to all manner of procedural innovations the courts may regard as more "practicable, economical, convenient, and fair" (Pet. App. 8a) than the ones the parties devised for themselves.[10] *See* Daily Labor Report (BNA), May 18, 1990, at A4-A6 (reporting on May 11, 1990 meeting of American Arbitration Association at which procedural innovations in arbitration were discussed.[11]

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[10] Moreover, the court of appeals' premise that there were in fact two existing arbitrations to "consolidate" (Pet. App. 6a) is demonstrably erroneous. The court of appeals itself admitted that the Mail Handlers never initiated the dispute resolution procedure under its own collective bargaining agreement because it "could not actually invoke the arbitration procedures under its agreement until the work was taken from its jurisdiction." Pet. App. 7a.

[11] Disputes comparable to the disagreement in this case concerning the parties and format of the arbitration frequently arise as to the procedures to be employed in arbitrations. Such disputes, for example, include controversies regarding the identity of the arbitrator (*Amalgamated Meat Cutters, Local 195 v. Cross Brothers Meat Packers, Inc.*, 518 F.2d 1113, 1121 (3d Cir. 1975); *Local Freight Drivers, Local No. 208 v. Braswell Motor Freight Lines, Inc.*, 422 F.2d 109, 112 (9th Cir. 1970), *cert. denied*, 400 U.S. 827 (1970); *General Drivers and Helpers Union, Local 554 v. Young and Hay Transportation Co.*, 522 F.2d 562, 567 (8th Cir. 1975)), the appropriate parties to the arbitration (*Int'l B'hd of Electrical Workers v. Western Electric Co.*, 661 F.2d 514, 516 (5th Cir. 1981); *United Steelworkers v. Smoke-Craft, Inc.*, 652 F.2d 1356, 1360 (9th Cir. 1981); *Matter of Arbitration Between Edward L. Beamer v. Texaco, Inc.*, 427 F.2d 885 (9th Cir. 1970)), and the steps necessary to invoke the grievance arbitration procedure (*Washington Hospital Center v. Service Employees Int'l Union, Local 722*, 746 F.2d 1503,

(b) Nor is there any difference of principle between court-imposed procedural schemes for settling labor disputes and any other court-imposed provision overriding a collective bargaining agreement, in terms of the destructive influence upon free collective bargaining generally and upon the role of arbitration particularly. As this Court has noted, "[l]abor disputes . . . cannot be broken down so easily into their 'substantive' and 'procedural' aspects." *Wiley, supra*, 376 U.S. at 557. For that reason, this Court has directed to arbitration not only the subject matter of labor disputes, but also "procedural matters which grow out of the dispute and bear on its final disposition." *Id.*

Wiley's discussion of procedural arbitrability surely did not contemplate that once an issue of that kind has been determined by the arbitrator, as it has been here, there

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1507 (D.C. Cir. 1984); *Philadelphia Printing Pressman's Union No. 16 v. Int'l Paper Co.*, 648 F.2d 900, 903 (3d Cir. 1981); *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 860 F.2d 1420, 1424 (7th Cir. 1988)).

There is currently a conflict between the courts of appeal as to whether the federal courts should decide questions of procedural arbitrability in the first instance where there are no factual disputes to resolve as to those procedural questions, or whether the federal courts should instead refer those questions to the arbitrator for decision, as they do where factual disputes exist. *See United Steelworkers v. Cherokee Electric Cooperative*, —— U.S. ——, 108 S. Ct. 1601, 1601-02 (1988) (White, J., dissenting from the denial of a petition for writ of certiorari). Regardless of which authority—the federal courts or the arbitrators—properly decide threshold questions as to procedural arbitrability in the narrow class of cases in which there are no material factual disputes, those procedural questions have *always* been approached as questions of contract interpretation in which the court *or* the arbitrator strives to determine the intent of the parties. (See cases discussed in previous paragraph.) *No* court, outside of the tripartite arbitration context, has held that § 301 gives the federal courts the power to *override* the intent of the parties in order to compel adherence to procedures that may be more "practicable, economical, convenient and fair." Pet. App. 8a.

can be a return to the courts to consider whether the parties' intent, as determined by the arbitrator, should be disregarded in pursuit of more equitable or efficient procedures. Indeed, it is no more or less destructive of the process of free collective bargaining for a court to override the parties' procedural solutions than it is for the courts to displace the parties' decision on substantive questions.[12]

(c) The Court of Appeals suggested, however, that another part of *Wiley* does support an authority in federal courts to *reject* contractually-established dispute resolution systems, and to substitute therefor judge-created procedures. In fact, however, the two aspects of the *Wiley* opinion are, as one would expect, entirely consistent, both with each other and with this Court's general support for free collective bargaining and voluntary arbitration schemes.

In *Wiley*, the threshold question was whether the employing entity that resulted from a merger between two other employers was required to arbitrate under a collective bargaining agreement entered into by one of the predecessor employers concerning post-merger labor relations obligations. This Court held that a successor employer could be bound to arbitrate where there was sufficient continuity of the business enterprise. In so de-

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[12] This case is illustrative: As noted above, the Postal Service chose to forego the opportunity of proposing a tripartite arbitration procedure in collective bargaining negotiations with the APWU. If such a proposal had been made, the APWU would have had the opportunity of considering it, bargaining over it, and receiving desired concessions from the Postal Service in return for agreeing to it. The Court of Appeals' decision to rewrite the agreement to give the Postal Service a benefit that it could have, but did not, seek through collective bargaining undermines the central principle of federal labor policy—the sanctity of free collective bargaining—and robs the APWU of whatever other benefit that it could have obtained in collective bargaining by agreeing to a tripartite arbitration procedure.

ciding, however, the *Wiley* Court was attempting to vindicate, not override through noncontract-based federal common law, the dispute resolution mechanism created by the parties to the relevant collective bargaining agreement:

> The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty. Thus, just as an employer has no obligation to arbitrate issues which it has not agreed to arbitrate, so *a fortiori*, it cannot be compelled to arbitrate if an arbitration clause does not bind it at all . . . We . . . find Wiley's obligation to arbitrate this dispute *in the Interscience contract construed in the context of a national labor policy.* [376 U.S. at 547, 550-51 (emphasis supplied).]

And the *Wiley* Court specifically *rejected* imposition of a bargaining obligation upon a successor employer where the "duty to arbitrate [would be] something imposed from without, not reasonably to be found in the particular bargaining agreement and the acts of the parties involved." *Id.* at 551. *See also NLRB v. Burns International Security Services, supra,* 406 U.S. at 286, 287 (emphasis supplied) (noting that *Wiley* "held only that the agreement to arbitrate, '*construed in the context of national labor policy*,' survived the merger," and holding that under *H.K. Porter, supra,* imposing a collective bargaining agreement upon a successor employer where there is *no* contractual basis whatever for the imposition would constitute impermissible " 'official compulsion over the actual terms of the contract' "); *Howard Johnson Co. v. Detroit Joint Executive Board,* 417 U.S. 249, 257 (1974) (viewing *Wiley* as a case in which, given the merger context, "holding Wiley bound to arbitrate under its predecessor's collective bargaining agreement may have been fairly within the reasonable expectations of the parties . . . to

the extent that its promises were intended to survive a change in ownership.")

Thus, the successorship aspect of *Wiley* was simply an application of the general principle that a federal court should order arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. . . . [and] [d]oubts should be resolved in favor of coverage." *Warrior & Gulf Navigation Co., supra*, 363 U.S. at 582-83. *See* discussion *supra*, at p. 18. *Wiley* was *not* a case, like this one, where we already know "with positive assurance that the arbitration clause is not susceptible of an interpretation that covers" the employer's preferred procedure, because an arbitrator under the contract has already so determined. And *Wiley* was therefore *not* an opinion sanctioning complete abandonment of the consensual nature of arbitration, and substitution of court-imposed obligations in the name of a broad-based federal common law of labor relations.

3. *Importance of the Issue*: While the narrow issue in this case—whether court-ordered tripartite arbitration is permissible—has arisen with some frequency in the district court [13] and has been alluded to by federal courts of appeal other than the Ninth Circuit,[14] the Second Circuit is the only court of appeals that has directly approved

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[13] *RCA Corp. v. Local Union 1666 Int'l Bhd. of Electrical Workers*, 633 F. Supp. 1009 (E.D. Pa. 1986); *American Broadcasting Co. v. Nat'l Ass'n of Broadcast Employees and Technicians*, 112 L.R.R.M. 2446 (N.D. Cal. 1982); *Baltimore Typographical Union No. 12 v. A.S. Abell Co.*, 411 F. Supp. 596 (D. Md. 1977) *aff'd. mem.*, 588 F.2d 1347 (4th Cir. 1979)) (all upholding court-ordered tripartite arbitration); *Meat Cutters Local 299 v. Alpha Beta Markets, Inc.*, 96 LRRM 2509 (S.D. Cal. 1977) (contra).

[14] *Laborers International Union of North America, Local 309 v. W.W. Bennett Constr. Co., Inc.*, 686 F.2d 1267 (7th Cir. 1982); *Window Glass Cutters League v. American St. Gobain Corp.*, 428 F.2d 253 (1970).

compelled tripartite arbitration of a jurisdictional dispute where the collective bargaining agreements provided only for bipartite arbitration. *See Columbia Broadcasting System, Inc. v. American Recording and Broadcasting Ass'n*, 414 F.2d 1326 (2d Cir. 1969).[15] Thus, although the issue is a recurring one of great practical importance in labor relations, the *result* of the Court of Appeals in this case, standing alone, might not merit this Court's attention.

What is of critical importance, however, and does merit this Court's immediate attention, is that the tripartite arbitration line of cases, culminating in the decision below, is based upon a view of the role of federal courts under § 301 of the LMRA that would inject the courts into both procedural and substantive questions which must instead be left for arbitrators to decide. The Court of Appeals' approach to this case harkens back to the days of the labor injunction, when federal courts saw their role as imposing their own view of appropriate labor relations upon the parties and the nation. *See, e.g., Jacksonville Bulk Terminals, Inc. v. Int'l Longshoremen's Ass'n*, 457

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[15] In so ruling, the Second Circuit relied primarily upon this Court's decision in a case decided under the Railway Labor Act (RLA), *Transportation-Communication Employees Union v. Union Pacific Railroad Co.*, 385 U.S. 157 (1966). As the Ninth Circuit has recognized, however, the foundation of this Court's decision to compel tripartite arbitration in *Transportation-Communication Employees* was that, under the RLA, tripartite arbitration of jurisdictional disputes is mandated by *statute*, while "the kind of expansive purview given to the Railroad Adjustment Board [over jurisdictional disputes] remains beyond what the Supreme Court has ruled as being within the limited competence of the labor arbitrator [in the LMRA context] whose authority arises out of a collective bargaining agreement." *Louisiana-Pacific Corp. v. Int'l Bhd. of Electrical Workers*, 600 F.2d 219, 224 (9th Cir. 1979). Not surprisingly, therefore, the Ninth Circuit in this case did not rely on *Transportation-Communication Employees* at all, but reached the same result as the Second Circuit based on different reasoning.

U.S. 702, 708 (1982); *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 250-51 (1970). In the more than forty years since the passage of § 301, this Court has never deviated from the position that that provision did *not* reinstate the federal courts, acting upon their own understanding of effective labor policy, as the ultimate authority over labor disputes. Rather, § 301 simply created in the courts the ability to aid the parties in reaching their *own* solution to their problems, via free collective bargaining and voluntary arbitration. The misunderstanding exhibited by the Ninth Circuit (and the Second Circuit) in this regard is basic, and so threatening to the sound development of national labor policy that it should be corrected before the error spreads further.

CONCLUSION

For the foregoing reasons, the Court should issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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June 13, 1990

APPENDIX

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-15284

D.C. No. CV-83-1383-WWS

UNITED STATES POSTAL SERVICE,
Plaintiff-Appellee,

v.

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Defendant-Appellant,

v.

NATIONAL POST OFFICE MAIL HANDLERS, WATCHMEN, MESSENGERS AND GROUP LEADERS DIVISION OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,
Defendant-Cross-Claimant-Appellee.

Appeal from the United States District Court
for the Northern District of California
William W. Schwarzer, District Judge, Presiding

Argued and Submitted
October 5, 1989—San Francisco, California

Filed January 12, 1990

Before: William A. Norris, David R. Thompson and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Thompson

Darryl J. Anderson, O'Donnell, Schwartz & Anderson, Washington, D.C., for the defendant-appellant.

Kevin B. Rachel, Office of Labor Law, United States Postal Service, Washington, D.C., for the plaintiff-appellee.

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OPINION

THOMPSON, Circuit Judge:

The American Postal Workers Union ("APWU") appeals the district court's decision ordering tripartite arbitration among the APWU, the United States Postal Service ("USPS"), and the National Post Office Mail Handlers, Watchmen, Messengers and Group Leaders Division of the Laborers' International Union of North America ("Mail Handlers"). This case presents a question of first impression: whether a district court may order parties to submit a dispute to tripartite arbitration despite their contractual agreements which provide only for bipartite arbitration. We hold that a district court can enter such an order and properly did so in this case.

FACTS

The APWU and the Mail Handlers represent postal employees. Until 1981, these two unions (and a third not involved in this case) bargained with the USPS collectively. Since 1981, however, the Mail Handlers have chosen to bargain separately.

The collective bargaining agreements between the USPS-APWU and the USPS-Mail Handlers are virtually identical in many respects. Both agreements contain broad provisions requiring that all disputes be submitted to arbitration. Formerly, when the unions negotiated as a unit, their single agreement contained a provision for tripartite arbitration to resolve disputes over which union had jurisdiction of a certain type of work. The present

separate agreements do not contain such a tripartite arbitration provision.

The current dispute arose at the USPS' San Francisco Air Mail Facility when the USPS assigned work to employees under the Mail Handlers' jurisdiction. The APWU filed a grievance. It alleged that the work should have been assigned to members of its union according to Regional Instruction 399, "Mail Processing Work Assignment Guidelines," by which all three parties are bound. Following the grievance procedure, the USPS-APWU dispute was scheduled for arbitration. The Mail Handlers attempted to intervene in this arbitration. The arbitrator concluded that despite the Mail Handlers' obvious interest, they could not intervene because the USPS-APWU agreement did not permit such intervention.

On April 12, 1988, the USPS filed suit in district court against the APWU and the Mail Handlers to compel tripartite arbitration. The APWU filed an answer and asserted counterclaims against the USPS. The Mail Handlers filed an answer and asserted crossclaims and counterclaims against the USPS and the APWU seeking tripartite arbitration and a permanent injunction covering any future jurisdictional disputes. The parties moved for summary judgment. The court granted the USPS' motion for summary judgment and ordered tripartite arbitration. The Mail Handlers' request for a permanent injunction was denied. The court later amended its order and denied the APWU's summary judgment motion. The APWU appeals. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

ANALYSIS

A. *Finality of the Order Compelling Arbitration as to the Mail Handlers*

The APWU contends that because the district court's order only specifically denied the Mail Handlers' request for a permanent injunction, the Mail Handlers' motion

for summary judgment seeking tripartite arbitration was never ruled upon; therefore there is no final judgment compelling tripartite arbitration as to the Mail Handlers. We disagree. The district court clearly ordered the requested tripartite arbitration and specifically denied the Mail Handlers' request for a permanent injunction. The district court recognized the Mail Handlers' entire summary judgment motion: "defendant Mail Handlers moves for summary judgment on both its counterclaim against plaintiff and its *cross-claim against APWU.*" (emphasis added). These claims were for tripartite arbitration.

In light of the district court's order compelling tripartite arbitration pursuant to the USPS' motion, it would be illogical to assume that the court considered and rejected the Mail Handlers' motion for the same relief. All parties had a clear understanding of the practical effects of the judgment, and no prejudice results from construing the judgment as a final judgment in regard to both parts of the Mail Handlers' motion. The judgment entered August 12, 1988 serves as a "final decision" reviewable by this court. *See Alaska v. Andrus*, 591 F.2d 537, 540 (9th Cir. 1979) (order did not expressly reject party's motion, but served as final judgment for purpose of appeal); *cf. Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (Court did not require order to be a separate document where the district court clearly evidenced its intent). We conclude that the order compelling tripartite arbitration is a final order as to the Mail Handlers, as well as to the USPS and the APWU.

B. *Authority to Order Tripartite Arbitration*

1. *Applicability of Section 301 of the Labor-Management Relations Act, 29 U.S.C. §185(a) (1982)*

Section 1208(b) of the Postal Reorganization Act, 39 U.S.C. § 1208(b) (1982), grants district courts jurisdiction over suits for violation of contracts among the USPS

and unions representing postal employees. Section 1209 provides that all consistent provisions of title 29, chapter 7, subchapter 11 apply. Thus, cases interpreting the nearly identical Labor-Management Relations Act section 301, 29 U.S.C. § 185(a) (1982), have been applied to determine the scope of a district court's authority in cases under the Postal Reorganization Act. *See, e.g., American Postal Workers Union v. United States Postal Serv.*, 823 F.2d 466, 469 (11th Cir. 1987); *National Ass'n of Letter Carriers v. United States Postal Serv.*, 590 F.2d 1171, 1174-75 (D.C. Cir. 1978).

2. *Contractual Nexus Required for Compulsory Arbitration*

Despite a presumption for arbitration when a contract contains an arbitration clause, *AT&T Technologies, Inc. v. Communications Workers*, 475 U.S. 643, 650 (1986), a court can only compel arbitration pursuant to the parties' contract. *See, e.g., United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) ("arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit"); *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 374 (1974) ("No obligation to arbitrate a labor dispute arises solely by operation of law. The law compels a party to submit his grievance to arbitration only if he has contracted to do so."). For the district court to have the power to compel tripartite arbitration, a contractual nexus is required as to both (a) the parties and (b) the subject matter.

In the current dispute, all parties agree that the *merits* of the work jurisdiction dispute are covered by the arbitration provisions of both the USPS-APWU contract and the USPS-Mail Handlers contract. Thus, although separate contracts exist, the dispute will be arbitrated; the question is which parties will participate in the first round of arbitration.

The Supreme Court has been somewhat lenient in deciding which parties will be required to arbitrate. The Court has not required strict contractual privity. *See, e.g., John Wiley & Sons v. Livingston*, 376 U.S. 543 (1964) ("successor employer" bound to arbitrate under predecessor's agreement with union). Nevertheless, some contractual nexus must exist. *See Laborers' Int'l Union v. W.W. Bennett Constr. Co.*, 686 F.2d 1267, 1274 (7th Cir. 1982) ("*Bennett*"). In the current dispute, all parties are contractually obligated to arbitrate, albeit in bipartite proceedings. *See id.*

> Only if the arbitrator is empowered to make binding interpretations of both agreements in the usual three-party jurisdictional dispute can he resolve the entire controversy as would the NLRB. At a minimum, this would require that each union be bound by an arbitration agreement with its employer which arguably covers work assignment disputes.

Id. at 1276. Tripartite arbitration is, in effect, a consolidation of two individual, consensual arbitrations. *See id.* at 1274. Here, the requisite contractual nexus is present: all of the parties have agreed to the arbitration of the merits of the current dispute.

3. *Suitability of Tripartite Arbitration*

Despite the existence of the requisite contractual nexus, the district court must examine other factors to ensure that tripartite arbitration is a suitable remedy for the actual case before it. *See Columbia Broadcasting Sys., Inc. v. American Recording & Broadcasting Ass'n*, 414 F.2d 1326, 1329 (2d Cir. 1969) ("*CBS*") (although the district court had power to order tripartite arbitration because of the contractual nexus, there was still a question as to whether the power was properly exercised). These factors include (a) the nature of the relevant arbitration provisions, (b) the invocation of each arbitration provision by a party to the agreement, and (c) any pro-

cedural concerns surrounding the implementation of tripartite arbitration. *See Bennett*, 686 F.2d at 1274; *CBS*, 414 F.2d at 1329.

Here, each separate agreement in question contains a provision requiring arbitration of any:

> dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment. A grievance shall include, but is not limited to, the complaint of an employee or of the Union(s) which involves the interpretation, application of, or compliance with the provisions of this Agreement or any local Memorandum of Understanding not in conflict with this Agreement.

Article 15, § 15.1, USPS-Mail Handlers Agreement, July 21, 1984-July 20, 1987; USPS-APWU Agreement, 1984-1987. By the use of these broad arbitration provisions, the parties have expressed a strong general preference for arbitration of contractual disputes.

We are also satisfied that "each arbitration agreement had been invoked by a party to the agreement." *Bennett*, 686 F.2d at 1274. The APWU clearly invoked its agreement with the USPS by initiating the grievance procedure. Further, the Mail Handlers' attempt to intervene in the arbitration was essentially an invocation of its agreement with the USPS. The Mail Handlers could not actually invoke the arbitration procedures under its agreement until the work was taken from its jurisdiction. However, the Mail Handlers clearly evidenced a desire to arbitrate. The Mail Handlers will not be penalized for attempting a more timely resolution of the dispute.

We are not faced with any procedural difficulties in this case. *See Bennett*, 686 F.2d at 1275 n.3 (noting possible difficulty in selecting a neutral arbitrator pursuant to two different agreements). The Mail Handlers have agreed to follow the arbitration procedures outlined by the USPS-APWU agreement. Thus, the APWU will not

be prejudiced by any alterations to the procedural structure of the arbitration to which it agreed. *See, e.g., Avis Rent A Car Sys. v. Garage Employees Union*, 791 F.2d 22, 23-25 (2d Cir. 1986) (arbitrator chosen under the "significantly different" procedure of an agreement cannot apply substantive provisions of a second agreement).

Compelling all three parties in this case to submit their grievance to the same arbitration is practicable, economical, convenient, and fair. It not only avoids duplication of effort, but also avoids the possibility of conflicting awards. *See CBS*, 414 F.2d at 1329. In our circuit, the possibility of conflicting awards is a serious threat because of our decision in *Louisiana-Pacific Corp. v. International Bhd. of Electrical Workers*, 600 F.2d 219 (9th Cir. 1979). Parties must request court intervention *before* receiving conflicting awards, otherwise the conflicting awards will stand—even if the awards claim to apply the same substantive rule. *Id.* at 226 (court reserved opinion on the propriety of compelling triparite arbitration).

Finally, the conclusions of the arbitrator should be considered. Although the arbitrator denied the Mail Handlers' petition to intervene in the USPS-APWU arbitration, he did so because he concluded that the USPS-APWU contract did not permit him to admit the Mail Handlers to the arbitration. Nonetheless, the arbitrator expressed his view that tripartite arbitration would be appropriate. He stated: "There is no question that the Mail Handlers have a strong, legitimate interest in the outcome of this arbitration." The arbitrator was also concerned "about the fundamental fairness of a grievance arbitration wherein the employer rather than the union represents the interests of certain employees. Tripartite arbitration is clearly the most sensible way to proceed."

In light of the trend in federal common law toward compelling tripartite arbitration under similar circumstances, we conclude that the district court did not err in ordering the APWU, the Mail Handlers, and the USPS

to engage in triparite arbitration. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957) (Federal courts must apply "federal law, which the courts must fashion from the policy of our national labor laws . . . . The range of judicial inventiveness will be determined by the nature of the problem.").

C. *Statute of Limitations*

The APWU also argues that the USPS suit was untimely. The USPS filed suit in district court approximately eight months after the arbitrator refused to permit the Mail Handlers to intervene in the APWU-USPS arbitration.

1. *The Six-Month Statute of Limitations*

Section 301 does not contain any statute of limitations period. Thus, the Supreme Court has held that the timeliness of a section 301 suit for breach of a collective bargaining agreement is determined "as a matter of federal law, by reference to the appropriate state statute of limitations." *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 705 (1966). However, the Supreme Court modified this decision and applied the six-month statute of limitations in section 10(b) of the National Labor Relations Act, 29 U.S.C. 160(b) (1982), to a "hybrid" section 301/unfair representation action. *Del Costello v. International Bhd. of Teamsters*, 462 U.S. 151 (1983).

This circuit, in *Teamsters Union Local 315 v. Great Western Chem. Co.*, 781 F.2d 764 (9th Cir. 1986), held that the same six-month period should apply to the filing of a petition to compel arbitration of a dispute under a collective bargaining agreement. *Id.* at 769. The six-month period enables parties to attempt private dispute reconciliation, yet provides for a relatively rapid resolution of the labor dispute. *See id.* at 767. The period begins to run from the time one party makes it clear that it will not submit the matter to arbitration. *Id.* at 769.

The APWU failed affirmatively to plead or assert the six-month statute of limitations as a defense in the district court. Federal Rule of Civil Procedure 8(c) requires that a statute of limitations defense be pleaded or it is waived. *Perry v. O'Donnell*, 749 F.2d 1346, 1353 (9th Cir. 1985). Moreover, the APWU did not rely on the six-month limitations period in opposing the USPS' motion for summary judgment. It relied solely on the California 100-day limitations period, which we discuss *infra*. Accordingly, the six-month limitations period was waived as a defense and we will not consider it for the first time on appeal. *See Bolker v. Commissioner*, 760 F.2d 1039, 1042 (9th Cir. 1985).

2. *California's 100-Day Limitations Period*

The APWU argues that California's 100-day limitations period, contained in Cal. Civ. Proc. Code § 1288 (West 1982),[1] applies to the USPS suit, because the parties essentially seek to overturn an arbitration decision. Although we agree that California's 100-day limitations period applies to suits to overturn an arbitration decision, *Fortune, Alsweet & Eldridge, Inc. v. Daniel*, 724 F.2d 1355, 1356 (9th Cir. 1983) (per curiam), we disagree with the APWU's characterization of the present suit.

This suit is one which seeks to compel tripartite arbitration. When the arbitrator refused to permit the Mail Handlers to intervene in the USPS-APWU arbitration, he limited his decision to the explicit terms of the USPS-APWU contract. He specifically noted that he did not have authority to compel tripartite arbitration apart from the terms of the contract. *Cf. United Bhd. of Carpenters*

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[1] Section 1288 provides:

> A petition to vacate an award or to correct an award shall be served and filed not later than 100 days after the date of the service of a signed copy of the award on petitioner.

Cal. Civ. Proc. Code § 1288 (West 1982).

v. FMC Corp., 724 F.2d 815, 817 (9th Cir. 1984) (relief sought could have been obtained in arbitration proceeding —Oregon state statute of limitations, not federal six-month statute applicable). We do have authority, under federal common law, to compel tripartite arbitration. This is the relief sought in this case. The suit is not one seeking to overturn an arbitration decision. It is a suit independent of the arbitration decision seeking relief which could not be obtained in the arbitration proceeding. We conclude that California's 100-day statute of limitations is inapplicable.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 88-15284

D.C. No. CV-83-1383-WWS

UNITED STATES POSTAL SERVICE,
Plaintiff-Appellee,

vs.

AMERICAN POSTAL WORKERS UNION, AFL-CIO,
Defendant-Appellant,

vs.

NATIONAL POST OFFICE MAIL HANDLERS, WATCHMEN, MESSENGERS AND GROUP LEADERS DIVISION OF THE LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,
Defendant-Cross-Claimant-Appellee.

Before: NORRIS, THOMPSON and O'SCANNLAIN, Circuit Judges.

ORDER

[Filed Mar. 15, 1990]

The petition for rehearing is DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-88-1383-WWS

U.S. POSTAL SERVICE,

Plaintiff,

vs.

AMERICAN POSTAL WORKERS UNION
and NATIONAL MAIL HANDLERS UNION,

Defendants.

MEMORANDUM OF OPINION AND ORDER

[Filed Aug. 5, 1988]

Plaintiff United States Postal Service seeks to compel three-way arbitration of a dispute between itself and defendants American Postal Workers Union, AFL-CIO ("APWU") and National Post Office Mail Handlers, Watchmen, Messengers, and Group Leaders Division of the Laborers' International Union of North America, AFL-CIO ("Mail Handlers") regarding a work assignment. Plaintiff moves for summary judgment. Defendant APWU opposes the motion and also moves for summary judgment or, in the alternative, dismissal. Defendant Mail Handlers moves for summary judgment on both its counterclaim against plaintiff and its cross-claim against APWU, and opposes APWU's motion.

The Court has jurisdiction pursuant to sections 409 and 1208 of the Postal Reorganization Act, 39 U.S.C. §§ 409 and 1208, and 28 U.S.C. §§ 1331 and 1337.

FACTS

APWU and Mail Handlers represent separate bargaining groups of United States Postal Service employees.

Originally, the two unions jointly engaged in collective bargaining negotiations with the Postal Service. However, beginning in 1981, Mail Handlers chose to bargain separately. Since then, plaintiff's collective bargaining agreements with APWU and Mail Handlers, which provide broad grievance procedures for any "dispute, difference, disagreement or complaint between the parties related to wages, hours, and conditions of employment," do not provide for any jurisdictional mechanism that includes the other union. APWU Agreement, Article 15.1, at 58; Mail Handlers Agreement, Article 15.1, at 65.

A jurisdictional dispute arose over plaintiff's assignment of work to Mail Handlers. APWU filed a grievance challenging the work assignment and appealed the dispute to arbitration. Mail Handlers petitioned to intervene in the arbitration, but APWU opposed its petition.

The arbitrator, William Rentfro, decided that tripartite arbitation was the preferred approach, but that he lacked the authority to compel such arbitration under the terms of APWU's collective bargaining agreement. Plaintiff then brought this action seeking to compel tripartite arbitration.

DISCUSSION

The issue here is whether the Court may order tripartite arbitration in the absence of any provision for it in the collective bargaining agreement. An obligation to arbitrate under collective bargaining agreements is normally a product of the parties' agreement to arbitrate, not imposed by law. *Louisiana-Pacific Corp. v. International Brotherhood of Electrical Workers, Local 2294*, 600 F.2d 219, 224 (9th Cir. 1979).

However, section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185,[1] gives federal courts broad

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[1] Section 301 is equivalent to section 1208(b) of the Postal Reorganization Act, 39 U.S.C. § 1208(b), which controls labor disputes with the Postal Service.

jurisdiction to handle many types of controversies that arise between labor and management. *See, e.g., John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-51 (1964) (upholding ruling requiring new employer to arbitrate with union even where employer had never entered into contract with union); *Columbia Broadcasting System, Inc. v. American Recording & Broadcasting Ass'n*, 414 F.2d 1326, 1328 (2d Cir. 1969). Courts have the power to order performance that is, in literal terms, outside the scope of the collective bargaining agreement. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960) (collective bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which draftsmen cannot wholly anticipate. The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or a particular plant," citations and footnote omitted); *Columbia Broadcasting System*, 414 F.2d at 1328.

Pursuant to this broad judicial power, courts have frequently ordered tripartite arbitration for jurisdictional labor-management disputes, even absent contractual provisions for such arbitration. In *Columbia Broadcasting System*, 414 F.2d at 1328-29, the court upheld the district court's order compelling tripartite arbitration of a dispute over work assignment where the employer's contract with both unions contained broad arbitration provisions and the first union agreed to arbitrate the dispute before an arbitrator selected in accordance with second union's agreement. *See also American Broadcasting Co. v. Nabet*, 112 L.R.R.M. 2446 (N.D. Cal. 1982) (tripartite arbitration ordered in case factually indistinguishable from *Columbia Broadcasting System*); *RCA Corp. v. Local Union 1666, International Brotherhood of Electrical Workers*, 633 F. Supp. 1009, 1012 (E.D. Pa. 1986) (tripartite arbitration compelled in suit by employer against two

unions, each claiming the same work); *Local 201, United Ass'n of Journeymen & Apprentices v. Shaker, Travis & Quinn, Inc.*, 555 F. Supp. 314, 318-19 (S.D.N.Y. 1983) (same); *Baltimore Typographical Union No. 12 v. A.S. Abell Co.*, 441 F. Supp. 596, 602-06 (D. Md. 1977) (same); *see also Window Glass Cutters League of America v. American St. Gobain Corp.*, 428 F.2d 353, 355 (3d Cir. 1970) (refusal to compel bipartite arbitration; dicta agreeing with Second Circuit's decision in *Columbia Broadcasting System*).

Moreover, although the Ninth Circuit has yet to decide this issue, it has approved the Second Circuit's decision in *Columbia Broadcasting System*, calling the opinion "thoroughly reasoned." *Louisiana-Pacific*, 600 F.2d at 226. In *Louisiana-Pacific*, the court affirmed inconsistent arbitrator's awards conferring the identical work on two unions where both union contracts provided only for bipartite arbitration. The court suggested that the employer should have incorporated a tripartite arbitration provision in the agreements or should have initially sought the district court's assistance in compelling tripartite arbitration even in the absence of contractual provision.

It remains to be decided whether the facts of this action support an exercise of the Court's discretion to order tripartite arbitration. In this case, both collective bargaining agreements have broad, nearly identical arbitration provisions. Furthermore, Mail Handlers has agreed to arbitration with the arbitrator selected pursuant to APWU's agreement and has agreed to be bound by the this arbitration. A decision on the work dispute will necessarily affect both unions regardless of whether only one union is actively involved in the arbitration process, and if there are two separate bipartite proceedings, there is a probability of conflicting awards. Both plaintiff and Mail Handlers want tripartite arbitration and only APWU opposes it. Finally, ordering tripartite arbitration in this instance is the fairest and most efficient

course of action. Accordingly, plaintiff's motion for summary judgment ordering tripartite arbitration will be granted.

Mail Handlers also seeks a permanent injunction ordering plaintiff and APWU to engage in tripartite arbitration with Mail Handlers for all jurisdictional disputes between the two unions. It would be inappropriate to issue such an order without consideration of the particular facts to determine if tripartite arbitration is warranted. Mail Handlers' request for a permanent injunction is denied.

IT IS SO ORDERED.

DATED: August 5, 1988

/s/ William W. Schwarzer
WILLIAM W. SCHWARZER
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Docket Number C 88-1383 WWS

WILLIAM W. SCHWARZER, Judge

U.S. POSTAL SERVICE

v.

AMERICAN POSTAL WORKERS UNION and
NATIONAL MAIL HANDLERS UNION

JUDGMENT IN A CIVIL CASE

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Plaintiff's motion for summary judgment ordering tripartite arbitration is granted. Mail Handler's request for a permanent injunction is denied.

WILLIAM L. WHITTAKER
Clerk

/s/ Wynette Bailey
WYNETTE BAILEY
(By) Deputy Clerk

Date: August 5, 1988

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-88-1383-WWS

U.S. POSTAL SERVICE,
Plaintiff,

vs.

AMERICAN POSTAL WORKERS UNION and
NATIONAL MAIL HANDLERS UNION,
Defendants.

ORDER

[Filed Aug. 30, 1988]

The Court's Memorandum of Opinion and Order of August 5, 1988, is amended by the addition of the following sentence:

> The motion for summary judgment filed by defendant American Postal Workers Union is also denied.

IT IS SO ORDERED.

DATED: August 30, 1988

/s/ William W. Schwarzer
WILLIAM W. SCHWARZER
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Docket Number C 88-1383 WWS

WILLIAM W. SCHWARZER, Judge

U.S. POSTAL SERVICE

v.

AMERICAN POSTAL WORKERS UNION, *et al.*

☒ Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

The motion for summary judgment filed by defendant American Postal Workers Union is also denied.

WILLIAM L. WHITTAKER
Clerk

/s/ Wynette Bailey
WYNETTE BAILEY
(By) Deputy Clerk

Date August 30, 1988

PERTINENT STATUTES

The Postal Reorganization Act, 39 U.S.C. Section 101, et seq.

Section 409 Suits by and against the Postal Service

"(a) Except as provided in section 3628 of this title, the United States district courts shall have origignal but not exclusive jurisdiction over all actions brought by or against the Postal Service. Any action brought in a State court to which the Postal Service is a party may be removed to the appropriate United States district court under the provision of chapter 89 of title 28.

"(b) Unless otherwise provided in this title, the provision of title 28 relating to service of process, venue, and limitations of time for bringing action in suits in which the United States, its officers, or employees are parties and the rules of procedure adopted under title 28 for suits in which the Unions, its officers, or employees are parties, shall apply in like manner to suits in which the Postal Service, its officers, or employees are parties.

"(c) The provisions of chapter 171 and all other provisions of title 28 relating to tort claims shall apply to tort claims arising out of activities of the Postal Service.

"(d) The Department of Justice shall furnish, under section 411 of this title, the Postal Service such legal representation as it may require, but with the prior consent of the Attorney General, the Postal Service or its officers or employees in matters affecting the Postal Service.

Section 1208—Suits.

"(a) The courts of the United States shall have jurisdiction with respect to actions brought by the

National Labor Relations Board under this chapter to the same extent that they have jurisdiction with respect to actions under title 29.

"(b) Suits for violation of contracts between the Postal Service and a labor organization representing Postal Service employees, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy.

"(c) A labor organization and the Postal Service shall be bound by the authorized acts of their agents. Any labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

"(d) For the purpose of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal offices, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

"(e) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

The Labor Management Relations Act of 1947, 28 U.S.C. Section 141, et seq.

STATUTORY PROVISIONS

Section 158. Unfair labor practices

* * * *

(b) Unfair labor practices by labor organizations

It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4) (i) to engage in, or induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft or class rather than to employees in another labor organization or in another trade, craft or class . . .

* * * *

Section 173. Functions of Service

(a) Settlement of disputes through conciliation and mediation

It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) Intervention on motion of Service or request of parties; avoidance of mediation of minor disputes

The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(c) Settlement of disputes by other means upon failure of conciliation

If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this chapter.

(d) Use of conciliation and mediation services as last resort

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for

settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

(e) Encouragement and support of establishment and operation of joint labor management activities conducted by committees.

The Service is authorized and directed to encourage and support the establishment and operation of joint labor management activities conducted by plant, area, and industrywide committees designed to improve labor management relationships, job security and organizational effectiveness, in accordance with the provisions of section 175a of this title.

Section 185—Suits by and against labor organizations

(a) Venue, amount, and citizenship

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf

of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction

For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process

The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency

For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Section 187—Unlawful activities or conducts right to sue; jurisdiction; limitations; damages

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting

commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.

(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.